(1) Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1997

Haywood Jackson Mizell, Petitioner

v.

United States of America, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
United States Court of Appeals
Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

(i) **Questions Presented for Review**

"Tax assessments enjoy a presumption of correctness." The IRS offered Judge Gordon no facts, just stipulations, and refused to offer a **CERTIFICATE OF OFFICIAL RECORD** or masterfiles for the 1987 payment of $421,118.24 swearing under oath to the IRS destruction of all the account records. Without benefit of a masterfile, Judge Gordon issued his 1990 Memorandum Opinion to reflect the exact substitute representation made to him by the IRS. In January 1996 Judge Albritton issued a summary judgment favorable to the IRS which again reflected Judge Gordon's Memorandum Opinion. Only **after** Judge Albritton's Memorandum Opinion did the IRS provide a 1990 payment masterfile which the IRS declared to be the embodiment of true tax assessments. In July 1996, nine years too late, and **after** Judge Albritton had completed his hearing, the court now has on record the unlitigated 1987 masterfiles and **CERTIFICATES OF OFFICIAL RECORD**, as provided by the IRS, for all accounts of Shelley Broadcasting Company, Inc., Associated Builders Corporation, and H. J. Mizell Architects.

The 1987 masterfile and **CERTIFICATE OF OFFICIAL Record** dispute the material facts and figures underlying the 1990 Judge Gordon, and the January 1996 Judge Albritton summary judgments, and erodes the application of the doctrine of collateral estoppel in this case.

QUESTIONS: Can a summary judgment stand in a case when a material dispute in the IRS tax account figures is uncovered? If the **CERTIFICATE OF OFFICIAL RECORD** and masterfile are the same and true, can these records correct IRS figures that they declare by comparison as false? Can the same masterfile support a judgment favorable to the IRS for a tax period underpayment, and support judgment favorable to the taxpayer for a tax period overpayment? Do newly-discovered-true tax assessments have an expiration date? Is five years after payment considered a reasonable time for the final release of a tax lien? Are IRS workers required to tell the truth?

(ii) **CERTIFICATE OF INTERESTED PERSONS AND CORPORATED DISCLOSURE STATEMENT**

It is hereby certified that the following persons and entities have an interest in the outcome of this case or have participated as attorneys or as judges in the adjudication of this case:

Abritton, W. Harold- United States District Court Judge for the Middle District of Alabama
Allen, Gary R., Chief-Appellate Section, Tax Division, USDJ
Argrett, Loretta C.- Assistant Attorney General, Tax Division, USDJ
Conover, Patricia - Assistant U. S. Attorney
Garrett, Leura - Assistant U. S. Attorney
Horwitz, Murray S. - Attorney, Appellate Section, Tax Division, USDJ
Pincus, David I. - Attorney, Appellate Section, Tax Division, USDJ
Pitt, Redding - United States Attorney
Russell, Bruce - Attorney, Civil Trial Section, Southern Region, Tax Division, United States Department of Justice
Shapiro, Steven Chief, Civil Trial Section, Southern Region, Tax Division, USDJ
Steir, Cynthia Lewis - Attorney, Civil Trial Section, Southern Region, Tax Division, USDJ
United States of America - Appellee
United States Court of Appeals for the Eleventh Circuit
Tjoflat and Cox, Circuit Judges
Kravitch, Senior Circuit Judge.
God, The Final Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

For cases from the **federal courts**:

The opinion of the United States Bankruptcy court appears at APPENDIX A to the petition and is reported at the United States Bankruptcy Court for the Middle District of Alabama, Shelley Broadcasting Company, Inc., v. Internal Revenue Service Adv. Pro. No. 89-0167-APG.

The Opinion of the United States district court appears at APPENDIX B to the petition and is reported at the United States District Court for the Middle District of Alabama, Southern Division, Mizell v. USA No.-94-01183 CV-A-S.

The denial of the petition for rehearing by the United States Court of Appeals appears at APPENDIX C and is reported at the United States Court of Appeals for the Eleventh Circuit, No. 96-6774 Mizell v. USA DIST.CT. NO.-94-01183 CV-A-S.

The affirmation of the judgment issued by the United States Court of Appeals appear at APPENDIX D to the petition and is reported at the United States Court of Appeals for the Eleventh Circuit, No. 96-6774.

JURISDICTION

The date on which the United States Court of Appeals decided my case was June 16, 1997.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 25, 1997, and a copy of the order denying rehearing appears at Appendix C.

A judgment was affirmed and issued as mandate by the United States Court of Appeals on the following date: October 8, 1997, and a copy of the judgment mandate appears at Appendix D.

The jurisdiction of this court is invoked under 28 U.S.C. $ 1254(1). and 28 U.S.C. $ 1291.

(vii) **CONSTITUTIONAL PROVISIONS INVOLVED**

The Constitution of the United States is so worded that the most common of citizens can understand its language. One important provision is that a trial by jury is preserved for every citizen in matters over twenty dollars.

Second, no citizen can be deprived of his property without due process. When the IRS is granted the status of speaking only the truth in court, how can a taxpayer dispute in court a false report presented by the IRS?

The issue in this case involves the posture the government has in relation to its subjects or citizens. Is the Internal Revenue Service arm of the United States of America government required to abide by the same laws as does the average citizen?

Is the Internal Revenue Service exempt from the maintenance of the tax records while it exacts a specific record maintenance time period from all taxpayers under its jurisdiction? Are the taxpayer masterfile records maintained by the IRS subject to review by the taxpayer?

The constitution relies on the Supreme Court to add balance to the protection of the citizen from the government. This case is a simple request for such balance. In fact, the tax which is the subject of this case is the simplest tax on the face of earth. The tax is the tax withheld from employee's wages.

STATEMENT OF CASE

The United States of America was granted a favorable Summary Judgment against Haywood Jackson Mizell's complaint as outlined in Judge W. Harold Albritton Memorandum Opinion rendered on January 10, 1996 in Civil Action No. 94-A-1183-S.

The Memorandum Opinion CONCLUSION stated, (Memorandum Opinion p.10)

> "The Plaintiff, Haywood Jackson Mizell, was accorded a full and fair opportunity to litigate the issues raised in this case;..."

The absence of the **CERTIFICATE OF OFFICIAL RECORD**, the absence of the corresponding 1987 payment masterfile denied Haywood Jackson Mizell the accord of full and fair opportunity to litigate the issues in this case.

Central to this case is this statement in Judge Albritton's Memorandum Opinion issued on January 10, 1996 (See page 9, paragraph 4),

> "That court found that trust-fund taxes of $206,824.82 were owed by Associated, and found that Associated's payment of $206,824.82 **was applied** to the trust-fund account by the IRS and that the IRS promptly released all liens of record after payment (Memorandum Opinion p.2); therefore, this court is of the opinion that the elements of collateral estoppel are met."

The **CERTIFICATE OF OFFICIAL RECORD** and the masterfile for these accounts dispute the above figures by Judge Albritton. The figures in the **CERTIFICATE OF OFFICIAL RECORD** and the masterfile document Associated as owing $108,276.06 in total taxes. Judge Gordon declared that only trust-funds had been paid by Associated; therefore, Associated owed $48,195.06 rather than the $206,824.82 as the IRS had told Judge Gordon. Also, the masterfiles show that the bulk of the liens were not finally released until

December 1992 and thereafter.

January 1996 when Judge Albritton made his summary judgment based on the doctrine of collateral estoppel, he did not have before him the 1987 masterfile which would have clearly shown the correct figures. Had Judge Gordon the benefit of the 1987 masterfile, his Memorandum Opinion would have been correct.

Judge Albritton's July 1996 judgment was based on a 1990 payment masterfile he demanded from the IRS. He received the 1990 payment masterfile in the **spring of 1996** after his January 10, 1996 Memorandum Opinion, but he never demanded or did he receive the masterfile for the 1987 payment presumably because the IRS had testified, under oath, that the 1987 masterile had been destroyed along with all the other records. The newly-uncovered 1987 payment masterfiles dispute all figures submitted by the Internal Revenue Service in the case before Judge Gordon. The IRS had to know that all its figures before Judge Gordon would have been disputed by the true 1987 masterfile tax assessments. The only way to do so was to swear to the destruction of all the files, the masterfile included. It's destruction would have placed the masterfile and true tax assessments beyond the reach of the court. The false stipulations were successfully moved to the court-required-status of a "presumption of correctness." Certainly, words like full and fair cannot be used.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure Note 47 which states,

> "Litigant has right to trial where there is slightest doubt as to the facts." Rains v. Cascade Industries, Inc., D.C.N.Y. 1966, 258 F.Supp.974. See, also, Car & General Ins. Corp. V. Goldstein, D.C.N.Y. 1959, 179 F. Supp. 888, affirmed 277 F.2d 162.

The IRS and Judge Albritton themselves dispute the testimony of the IRS

before Judge Gordon's court.

How?

By their actions and Opinions.

a. The IRS presented to Judge Albritton assessments which were true and were reflected in the **CERTIFICATE OF OFFICIAL RECORD** and in the 1987 Payment Masterfile. The outstanding assessments totalled for both companies less than $80,000. The IRS stated to Judge Gordon (the same statement made a part of Judge Albritton Memorandum Opinion, See page four, footnote four),

> "Shelley and Associated accumulated, respectively, some $98,100 and $81,300, plus interest and penalties."

Judge Albritton disputes that statement in his **ORDER AND JUDGMENT** dated July 10, 1996. He stated in a Paragraph

> "2. Judgment is hereby entered in favor of the United States of America and against Haywood Jackson Mizell in the amount of $129,381.09."

Note, even thought the unpaid tax assessments were made against Mizell as "responsible person penalties" which mean the figures are about two-thirds of the total corporate taxes,the tax assessments on page 4 (a) for Shelley was for $30,155.43, and (b), the assessment for Associated Builders was a larger figure of $38,666.86.

These assessments project more than slightest doubt as to the testimony before Judge Gordon. The judgment established the total amount, including penalties and interest, to be only a combined total (for three companies, not two) of $129,381.09 as of December 31, 1994. (See again page 4).

Please understand that Shelley sold its major asset in the fall of 1987 so as to pay the IRS tax obligations. It is impossible for Shelley to have factually accumulated $98,100 tax obligation in only fifteen months. This is yet another truth which is more than slight in meeting the threshold for a dispute. A summary judgment cannot be

granted in the face of a material dispute.

b. A second abandonment of Judge Gordon's Memorandum Opinion by Judge Albritton is the change in the total figure paid. (See page 3, footnote 2, Memorandum Opinion, Jan 10, 1996) Judge Albritton is unquestionable fair and honest. He changed the error in Judge Gordon's Memorandum Opinion when facts demanded it. Had Judge Albritton had the 1987 masterfile similar to the 1990 masterfile he had in his hands, his rulings would have reflected the 1987 masterfile in similar fashion as his 1990 masterfile-driven-judgment did. The IRS cannot today document the certified check corrected figure of $236,244.55 from a stipulation figure of $245,501.74 except to prove that $323,565.89 was the total in excess collection for the two companies.

Why?

The masterfiles so state.

The 1990 masterfile was withheld until **spring of 1996** before the June 1996 hearing. The 1987 masterfile was withheld until July 1996, after Judge Albritton's hearings were over.

Why?

The IRS would have to face the truth.

c. The IRS knew in 1990 that all taxes had been paid because of the overpayment. The 1990 masterfile showed the IRS making a refund to Haywood Jackson Mizell in the amount of $3,820.73. No refund is possible if an outstanding debt for any period is due. The overpayment is always applied first to any obligation until consumed. Since the refund is a matter of record, then there is no obligation in any of the three businesses after 1990 for quarters prior to 1990. The IRS actions dispute Judge Albritton's **ORDER AND JUDGMENT**, dated July 10, 1996 which exacts a judgment in favor of the United States of America against Haywood Jackson Mizell in the amount of $129,381.09 including interest. Judge Albritton's statement, in

open court, contradicts the actions of the IRS and its masterfile, which Judge Albritton proclaims he presumes as correct. Judge Albritton said,

> "So, the contention that was made sometime back that the bankruptcy judge determined was that it extinguished all tax liabilities of Shelley and Associated Builders prior to 1990 is erroneous. That what the bankruptcy judge determined was that it extinguished everything that was a liability at the time of the sale, which was 1987. That was what the ruling was." (see Hearing on Motion for Summary Judgment, dated June 26, 1996 before Honorable W. Harold Albritton, page 54, paragraph 3).

Compare this writing with the pleading in this case by Cynthia Lewis Stier, attorney for the Justice Department. She wrote,

> "The IRS applied the October payment to..., and to a portion of the outstanding liability of Associated Builders. This application did not extinguish the trust fund portion of the Form 941 liability for Associated Builders."

Please note that her pleading was her interpretation of Judge Gordon Memorandum Opinion. The question remains as to who is wrong? Is Judge Gordon? Is Judge Albritton? Or is Cynthia Lewis Stier wrong? The now-found masterfile says all three are wrong. The 1987 masterfile shows the total tax owed by Associated was paid in the amount of $108,276.06. The certified check shows a payment of $236,244.55 was made against the Associated account creating an overpayment. But wait, Judge Albritton has declared,

> "Tax assessments enjoy a presumption of correctness."

Which are correct? The measure which guides the IRS is simple. Everything is correct so long as it is favorable for the

IRS, and is detrimental to the taxpayer.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure Note 27, states

> "The summary judgement procedure is valuable for striking through sham claims and defenses which stand in the way of a direct approach to the truth, but was not intended to and cannot deprive a litigant of right to a jury trial." Whitaker v. Coleman, C.C.A.Ala.1940, 115 F.2d 305.

On the face of the this complaint, Haywood Jackson Mizell demanded a jury trial. Instead, he received a summary judgment based on a stipulation, **not** a true masterfile tax assessment.

The 1987 masterfile would have never surfaced had it not been for Revenue Officer, Don Abrams whose purpose was to prove that the IRS is not as corrupt as would be proven by the masterfile, a masterfile which could never be destroyed, according to Don Abrams.

The masterfile judges all who touch it. The stipulation presented by the IRS in Judge Gordon's court is the basis of the summary judgment now in the hand of the United States Supreme Court praying for rejection. With the acceptance, by this court, of the true 1987 masterfiles all disputes between the IRS and Haywood Jackson Mizell are resolved.

Please know that it is apparently standard procedure for the IRS to withhold its masterfiles, make false affidavits, and, in short make to the court any and all false reports and statements as necessary, in order to avoid jury trial. The IRS abuses its "presumption of correctness" discretion by extending the presumption to patently false tax assessments figures, books, affidavits, levies, statements, etc.

During the course of the proceeding, the IRS set out to harass Haywood Jackson Mizell simply because of his request again for the 1990 payment masterfile. The IRS desired to punish him by not providing the

requested masterfile, and to then immediately prepare a blatantly false affidavit by Mrs. Graves (later corrected with impunity). The IRS then invaded the company's checking account with a successful levy, and then collected the second duplicate amount from a client. All within the declared purpose, as stated by Mrs. Graves, "We are going to put you out of business." The levy against the client destroyed a fifteen year contractual relationship. Torturous interference with a contract is a serious obstacle.

The IRS made a refund in this matter, but did so in its own time. The cost of the IRS contract interference to Haywood Jackson Mizell cannot be accurately measured, but it was a minimum of $283,000. All the IRS would say was, "I'm sorry."

The IRS maintains two sets of books as did Al Capone. The IRS does not assassinate americans physically, unless you count the related suicides, but it regularly destroys health, happiness, the peaceful pursuit of an honest living, the ability to do business, family relations, professional standing, and emotional stability.

Haywood Jackson Mizell, the individual "child of God" would be remiss if he did not thank the IRS for such a grinding-rock-experience, and the such common unrelenting torture administered by overzealous hands of some of the IRS personnel.

When one is forced to abandon the highly-esteemed-among-men for no one else but God for sympathy and solace, then life's true exposure is in clear focus. The shout that is spoken quietly is truth itself, "I will not fear what man may do unto me."

God says, "I will never leave thee nor forsake thee."

I do fear that the Supreme Court of the United States will also be manipulated by the IRS. One is powerless to prevent it.

By their examples, the IRS personnel made Haywood Jackson Mizell see what he

really is. God is worthy of thanks. A pile of paper dust called money, and perfect vision in hell, where there is no light, can never give comfort, or a means of escape. This is cited simply for what it is, a report from the field hopefully to make this court more sensible to what is now its task. The IRS has now, in truth, made available for the Supreme Court of the United States the inspection of the 1987 and 1990 masterfiles, and the duplicate **CERTIFICATE OF OFFICIAL RECORD**, sealed and certified as true, by the IRS. A jury can decide these true facts in preparation for law application.

Judge Albritton ruling on the counterclaim has made it absolutely clear that masterfiles are correct. Haywood Jackson Mizell does not wish to defraud the IRS of any money due it as evidenced by the sale of a major asset, a sale made necessary by the withholding of earned payments by yet another government agency. The IRS is entitled to all the taxes incurred after 1987 as well as all the taxes incurred before 1987. The masterfile testimony defines both the taxes owed before 1987 and those taxes owed after 1987. The two cashiers checks are in the amounts of $236,244.55 and $184,873.69 and were paid October 16, 1987.

The courts were presented copies of cancelled checks to validate payment. The checks were ignored except to later correct a false figure presented to Judge Gordon. In 1990, Judge Gordon had a copy of cancelled check in hand, yet declared, as true, a statement in open court by the IRS attorney. This was done even though the figures were contradicted by the check. There was no typographical error. The IRS could not get its false figures to add up. An overpayment of $323,565.89 remains in the hands of the IRS without refund. If the Supreme Court cannot make the proper correction, then the IRS will have proven that, in this case, "crime does pay."

Certain facts were determined by Judge Gordon that are independent of the nine-year-withheld masterfile. Judge Gordon determined that only **trust-funds** were paid for Associated Builders, and that the twice paid 940 unemployment non-trust fund taxes were to be refunded because of duplicate payment to the State of Alabama. Second, no funds were paid for H. J. Mizell, Architect which is a sole proprietorship.

The matter of lien satisfaction at the courthouse has two facets. One, the liens were released the same day as payment received, and as testified to by Roger Forehand, Revenue Officer. Second, the masterfile shows that the liens were not released until late 1992 and thereafter. Liens, if released and then refiled, has the same detrimental effect as **no** release at all. The facts of "twice filed liens", which had been paid were widely distributed among creditors and made Haywood J. Mizell appear as one not given to truth telling, which is the worst kind of damage for a business manager, and for one's personal character standing. An architect charged with spending millions of other people's money must possess a flawless character. An architect of questionable character is unable to attract business. The untimely release of liens had a devastating effect, and led to the closing of businesses.

In 1991, Roger Forehand came again to collect these same paid taxes (for the fourth time for some quarters).

Fortunately, there remained a faithful few who knew that the IRS could not possibly be right, and were willing to courageously expose themselves to IRS harassment. Included in those faithful few were IRS employees, Don Abrams and Mrs. Kilpatrick-Graves who told Haywood Jackson Mizell, by telephone, that she would never lie to him. Such actions are greatly appreciated. Don Abrams told Haywood Jackson Mizell that he

should take the masterfiles and the cancelled certified checks to the problem resolution office and collect the refund although Don Abrams could not do it himself. When a case is in legal, the problem resolution office is powerless even to give an application breakdown for a certified check payment. The conclusion for reasonable men is that the Justice Department is worthy of more scrutiny than even the IRS.

COMPARISON OF IRS TWO SETS OF BOOKS

941 Employment Taxes

Shelley Taxable period	Stipulation Judge Gordon Amount Applied	Masterfile Found 7/96 Owed&Paid
31-Dec-84	$0.00	$0.00
30-Sep-85	$19,970.09	$0.00
31-Dec-85	$21,961.97	$0.00
30-Mar-86	$22,270.08	$22,720.08
30-Sep-86	$9,648.91	$0.00
31-Dec-86	$33,503.38	$0.00
30-Mar-87	$28,165.43	$0.00
30-Jun-87	$27,651.56	$0.00
31-Sep-87		$23,482.02
31-Dec-87		$3,155.29
Totals	$163,621.42	$49,357.29

Associated Builders

30-Mar-85	$1,612.28	$0.00
30-Jun-85	$3,716.03	$3,716.03
30-Sep-85	$40,103.75	$40,103.75
31-Dec-85	$39,074.34	$0.00
30-Mar-86	$31,429.25	$31,429.25
30-Jun-86	$2,713.34	$0.00
30-Sep-86	$10,520.47	$10,520.47
31-Dec-86	$22,506.56	$22,506.56
30-Mar-87	$17,563.19	$0.00
30-Jun-87	$18,077.13	$0.00
30-Sep-87	$19,508.48	$0.00
Totals	$206,824.82	$108,276.06

trust-fund only (Judge Gordon) $48,195.06

In Judge Gordon Memorandum Opinion, he made the following findings, footnote 2, page 2,

> "IRS received two checks from the closing attorney. One for $184,873.69 was applied to the Shelley tax account. The other for $245,501.74 was applied to the Associated Builders account and paid employment (trust fund) taxes of $206,824.82 and unemployment (nontrust fund) taxes of $38,672.92. These payments also released Mizell from trust fund tax liability. See note 3. However, none of the funds were applied to Mizell's individual tax liability of some $22,000."
>
> Footnote 3, "Trust fund or employment taxes, consisting of social security taxes and withhholding taxes, are to be withheld from employees' wages and held in trust pursuant to Internal Revenue Code # 6672. The two corporations were also liable for federal and state unemployment or nontrust fund taxes"

Judge Gordon declared that only "**trust-funds**" were paid in the $206,824.82 for Associated Builders. The $108,276.06 represents both "**trust-fund**" and **non-trust fund** in the matching employers amount added as well. The correct trust fund amount without the employers matching nontrust fund amount is $48,195.06, not $108,276.06. The correct amount owed as of 30 September 1987 is a combined total of Shelley ($49,357.29) and Associated Builders ($48,195.06) or $97,552.35, or by simple subtracting the amount paid by what was owed, the refund amount is **$323,565.89**.

Please note that the nontrust funds unemployment taxes had been already paid to the State of Alabama and the IRS had no claim for any of these taxes. See page 6, Judge Gordon Memorandum Opinion,

> "IRS admits an overpayment of the

unemployment taxes of Shelley and Associated Builders.."

Please note that the amount paid was the sum of two certified checks in the amounts of $184,873.69 and $236,244.89. The amount owed is the sum of $49,357.29 and $48,195.06. Also note that these are total true and correct tax figures which are due. The figures are "**trust-fund**" only as so decided by Judge Gordon, but with true figures. The October 16, 1987 overpayment is **$323,565.89**.

Look closely at the figure and the observation will speak volumes as to the actions by the IRS in the delays, withholding of masterfiles, false statements, false affidavits and false figures. The IRS wanted its false tax assessments to be presumed correct, but in 1996 the 1990 payment masterfile had to be finally exposed in order for the IRS to get Judge Albritton's **ORDER AND JUDGMENT** against Haywood Jackson Mizell for the post 1987 tax liabilities. It is simple. The masterfiles exact both the prior and post 1987 tax liabilities. For whatever the reason the IRS did not expose Judge Gordon or Judge Albritton to the prior 1987 masterfile-true-tax assessments. The IRS is depending on the Supreme Court to sanction the IRS's masterfile defined theft of **$323,565.89**. If there is the slightest doubt in the mind of this court, then please send the case back to twelve members of a jury to decide the true facts.

Perhaps now would be a good time to recite Rule 56 Note 48.

> "In ruling on motion for summary judgment, district court must not resolve factual disputes by weighing conflicting evidence since it is province of jury to assess probative value of evidence." Toney v. Kawasaki Heavy Industries, Ltd., S.D.Miss.1991,763 F.Supp.1356.

The Unites States of America relies on

THE DOCTRINE OF COLLATERAL ESTOPPEL in order to prevent Haywood Jackson Mizell from relitigating the issues of the propriety of the October 16, 1987 overpayment. Religitigation is necessary because of the IRS obstruction of a direct approach to the truth by withholding the true assessments from the court as are recorded in the IRS masterfile and as so certified and sealed as true in the duplicating **CERTIFICATE OF OFFICIAL RECORD**. The absence of a true masterfile denies a full and fair opportunity to litigate the issues in dispute here.

Now that the masterfiles are the true assessments according to the IRS testimony in the 1990 hearing and the **CERTIFICATE OF OFFICIAL RECORD**, a summary judgment is now the obligation of the court mainly because the masterfiles eliminate all matters in dispute.

Again Rule 56 of the Federal Rules of Civil Procedure Note 27 so states,

> "Summary judgment is authorized only where a moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no general issue remains for trial; purpose of the rule is not to cut litigants off from their right of trial by jury if they have issues to try." Poller v. Columbia Broadcasting System, Inc., App.D.C.1962,82 S.Ct.486,368 U.S. 464,7 L.Ed.2d 458.

Haywood Jackson Mizell does not dispute the 1990 Masterfile or the 1996-found masterfiles which states the facts surrounding the 1987 tax obligation payment. The IRS has now submitted these same documents and sealed and certified to their truth. Reasonable minds would conclude that there now exist no dispute as to material fact in this case. If such is true, then Haywood Jackson Mizell is entitled to a summary judgment for the overpayment of the prior 1987 tax obligations in the amount of

$323,565.89 plus interest. The IRS is entitled to a summary judgment for the payment of post-1987 tax obligations in the amount of **$79,722.38** plus interest as outlined in Judge Albritton's **ORDER AND JUDGMENT**. Rule 56 of Federal Rules of Civil Procedure Note 75 states,

> "Where it appears that there is no genuine issue as to any material fact upon which the outcome of the litigation depends, case is appropriate for summary judgment, and it becomes the duty of the court to render such judgment." Brodrick v. Core, C.A.Kan.1955, 224 F.2d 892.

Judge Albritton rendered a summary judgment in the form of an **ORDER AND JUDGMENT** dated July 1996 when he had a masterfile before him. The January 10, 1996 **MEMORANDUM OPINION** as issued by Judge Albritton is in error because Judge Albritton had no masterfile before him. The IRS withheld the masterfile for the 1987 payment. The IRS withheld the same masterfile from Judge Gordon. The IRS had testified in open court that the same masterfile had been destroyed. Now that the masterfile exists, and speaks to all questions, it is appropriate for a summary judgement favorable to Haywood Jackson Mizell be issued for the 1987 overpayment of **$323,565.89** plus interest.

REASONS FOR GRANTING THE PETITION

The true tax assessment maintained in the IRS masterfiles and the same which are sealed and certified in the Department of Treasury **CERTIFICATE OF OFFICIAL RECORD** has never been subject to the requested litigation filed as a complaint by Haywood Jackson Mizell.

The IRS withheld the masterfiles containing the true tax assessments from 1987, the date of tax payment, until July 1996, after the date which all litigation ended before the two federal district courts and all IRS administrative appeals had ended. The masterfile taxes are material in the these cases.

The IRS has embraced a masterfile-disputed stipulation as to what the masterfile would have said, and led both the courts and Haywood Jackson Mizell to believe that the testimony of a Revenue Officer under oath was true, in that, the masterfiles had been destroyed, thereby beyond the reach of the courts.

The obvious IRS purpose was to keep excess tax collections. Two tax payments were made to two different Revenue Officers at two different times. The second payment was handled correctly by the lady Revenue Officer even though the masterfile was withheld from the taxpayer for six years. The second tax payment resulted in a computer generated tax refund for an overpayment.

The first payment has never been processed as to the masterfile record of what was paid. No one can account for the location of the funds for the first payment. To date the IRS has remained silent to the written request for a breakdown of the application of the cashiers checks which were the instruments of the payment. The IRS Revenue Officer who took the first payment has been terminated with cause, and the cause is unknown to the payer.

The facts can only be determined by a jury. Haywood Jackson Mizell believes that it is in the best interest of the courts, the IRS management, and all United States citizens to know the facts. If the facts are as they appear, then perhaps the IRS can be convinced that it is best for all to abide by the rule of common decency, before God intervenes by withholding His natural blessings on this nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Haywood Jackson Mizell

Haywood Jackson Mizell

Date: Dec 15, 1997

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997
HAYWOOD JACKSON MIZELL, PETITIONER
VS.
THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Haywood Jackson Mizell, do swear or declare that on this date, Dec 15, 1997, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that parties counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

MURRAY S. HORWITZ
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

REDDING PITT
U.S. Attorney's Office
P.O.197
Montgomery, AL 36101

I declare under penalty of perjury that the foregoing is true and correct.
Executed on Dec 15, 1997

Haywood Jackson Mizell
Haywood Jackson Mizell

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

For The Eleventh Circuit

No. 96-6774

Non-Argument Calendar

D. C. Docket No. CV-94-A-1183-S

HAYWOOD JACKSON MIZELL,

Plaintiff-Counter-Defendant, Appellant.

versus

UNITED STATES OF AMERICA,

Defendant-Counter-Claimant, Appellee.

Appeal from the United States District Court for the Middle District of Alabama

---

Before TJOFLAT and Cox, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 16, 1997

For the Court: Miguel J. Cortez, Clerk

By:"s/Matt Davidson

ISSUED AS MANDATE:10/8/97 Deputy Clerk

APPENDIX B

FILED JAN 10, 1996
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

HAYWOOD JACKSON MIZELL,	)	
	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION
	)	NO.94-A-1183-S
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

In accordance with the Memorandum Opinion entered on this day, it is hereby ORDERED that Defendant's Motion for Summary Judgment is GRANTED, and judgment is entered in favor, of the Defendant, United States of America, on the Plaintiffs complaint.
DONE this 10th day of January, 1996.

"s./ W.HAROLD ALBRITTON
UNITED STATES DISTRICT JUDGE

EDO 1/10/96

FILED JAN 10 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

HAYWOOD JACKSON MIZELL	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	94-A-1183-S
UNITED STATES OF AMERICA,	)	
	)	
Defendant and Counterclaimant.	)	

MEMORANDUM OPINION

INTRODUCTION

This cause is before the Court on a motion for summary judgment filed by the Defendant, United States of America, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Although the Defendant has filed a counterclaim, the motion is addressed only to the complaint.

The Plaintiff, Haywood Jackson Mizell, brought suit on September 14, 1994, alleging that he was entitled to a refund of $46,500, plus interest, from income taxes overpaid and wrongfully allocated by the IRS. On December 22, 1994, the Defendant answered, denying that the government owed anything to Plaintiff. On March 13, 1995, the Defendants filed an Amended Answer and asserted a counterclaim to reduce to judgment the outstanding federal tax liabilities of the Plaintiff.

On July 26, 1995, Defendant filed a motion for summary judgment asserting that the Plaintiff lacked standing and, in the alternative, that the doctrine of collateral estoppel prevents Plaintiff from relitigating these issues. The Defendant applied for an

entry of default on its counterclaim on the same day, but this Court entered an order on July 28, 1995 continuing the case and allowing Plaintiff until August 18, 1995 to respond to the motion for summary judgment and to file an answer to the counterclaim. On August 18, 1995, Plaintiff filed a timely answer to the Defendant's counterclaim and a response to the motion for summary judgment.

FACTS

The submissions by the parties establish the following facts:

Plaintiff, Haywood Jackson Mizell, operated three businesses, Associated Builders Corporation, Inc. ("Associated"); Shelley Broadcasting, Inc. ("Shelley"); and H. J. Mizell, Architect, a sole proprietorship ("the sole proprietorship"). Plaintiff was the President of Associated and owned 51% of its stock. Plaintiff owned all of the Shelley stock.

Beginning sometime prior to 1987, assessments were made by the Internal Revenue Service ("IRS") against Associated Builders, Shelley, and the sole proprietorship. Additionally, Trust Fund Recovery Penalty assessments were made against the Plaintiff, Mizell, pursuant to I.R.C. 26 U.S.C. CODE 6672, with respect to unpaid Form 941 trust-fund liability of Associated.(1)

(1)The Internal Revenue Code directs employers to deduct, or withhold, FICA and federal income tax from its employees' paychecks. 26 U.S.C. CODE 3102(a), 3402(a)(1). The amount withheld is to be placed in a special fund in trust for the United States, 26 U..S.C. CODE 7501, thus these taxes are often referred.to as

In 1987, Shelley sold one of its holdings, Radio Station WRJM-FM. In order to sell the property free of tax liens, $421,118.24 of the sale proceeds was specifically withheld for the payment of taxes. A check for $184,873.69 was applied to Shelley's tax assessment and a check for

$236,244.55(2) was applied to Associated's assessment.(3) That sum, paid to the IRS, was sufficient to cover the entire tax liability of Shelley and Associated, at that time. Upon receipt of this payment, the IRS promptly released all liens of record against these two corporations. None of these proceeds was applied to the sole proprietorship or to Mizell, personally, but the payment did release Mizell from his personal trust-fund liability.

Following the payment of Shelley's And Associated's taxes, an overpayment of $16,690.63 was discovered due to unknown tax credits resulting from unemployment taxes paid to the State of

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"trust-fund" taxes.

Any person required to "collect, truthfully account for, and pay over" trust-fund taxes, who "willfully fails to collect such taxes, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected,or not accounted for and paid over." 26 U.S.C. S 6672.

(2)This amount was originally recorded as $245,501.74, but has been corrected for this trial. $206,824.82 was applied to Associated's **trust-fund** taxes, and $38,676.92 was applied to **nontrust-fund** taxes.

(3)Although it is unclear exactly what Associated's interest was in the radio station, there was apparently some concern by the closing attorneys about how Associated's liabilities may affect the property due to the "commingling" of funds between Plaintiff's several companies.

Alabama. Instead of being refunded, this overpayment was used to offset, pursuant to 11 U.S.C. Code 553, unpaid taxes which had accumulated after the sale.(4)

In 1989, Shelley filed for protection

under Chapter 11 of the Bankruptcy Code. In re: Shelley Broadcasting Co., Inc., Case No. 89-2855-APG Ch. 11 (M.D. Ala. 1989). In that case, Shelley filed an adversary proceeding pursuant to Bankruptcy Code, 11 U.S.C. Code 505, seeking, among other things, a refund of the overpayment. Shelley further claimed that the IRS had improperly applied funds to the nontrust tax liabilities of Associated.(5)

The Bankruptcy Court held a trial on the adversary proceeding on June 27, 1990. The Court rendered a judgment on September 5, 1990, affirming the IRS' allocation of the proceeds, including the overpayment. In re: Shelley Broadcasting Co., Inc., at page 6.

Shelley filed a notice of appeal on November 2, 1990. The appeal was dismissed, with consent of the appellant, on May 23, 1991.

Haywood Jackson Mizell then brought suit in the present case. Mizell, acting as his own attorney, filed a complaint September 14, 1994, alleging that:

A. The IRS "did not apply the taxes as paid," and that the

(4)Shelley and Associated accumulated, respectively, some $98,100 and $81,300, plus interest and penalties.

(5)Shelly (through Mizell) claimed that there was an agreement to pay only the trust-fund, not the nontrust-fund, liabilities of Associated, and to use the remainder of the allocated sales proceeds to pay the taxes of Mizell, including his individual taxes.

liens imposed for the "trust-fund amounts" were not released until several years after payment.

B. The IRS should provide "a schedule of the application of the $206,824.82" applied to the **trust-fund** taxes of Associated after the 1987 sale.

C. A proper accounting of the funds paid toward the **trust-fund** taxes in 1987 would show that the payment was not applied to the trust-fund as it was supposed to be.

The Defendant filed an answer on December 22, 1994, denying liability to Plaintiff. On March 31, 1995, the Defendants filed an amended answer and counterclaim alleging that, as of December 31, 1994, Plaintiff was indebted to the United States in-the amount of $129,381.09, plus interest and statutory additions.

On July 26, 1995, the Defendant filed a motion for summary judgment asserting that: 1) Plaintiff lacks standing to bring this suit; and 2) the doctrine of collateral estoppel prevents Plaintiff from relitigating the propriety of the IRS' allocation of the proceeds from the 1987 sale.

DISCUSSION

This court recognizes that the Plaintiff has not clearly articulated the grounds upon which he bases his claims. This Court is also aware, however, that pro se pleadings must be judged more leniently than professionally drafted complaints. Haines v. Kerner, 404 U.S. 519, 520 (1972).

It appears to this Court that the Plaintiff, through his complaint and subsequent motions, has asserted two grounds for relief. First, Plaintiff claims that the money applied by the IRS to the **nontrust-fund** taxes of Associated (following the 1987 sale of the radio station), as well as any overpayments which arose at that time, should have been applied to the sole proprietorship instead of Associated. Plaintiff further contends that the 1990 Bankruptcy Court's Memorandum Opinion ordered the IRS to apply the funds in such a manner. This, Plaintiff contends, would have extinguished the liability of the sole proprietorship, rendering Plaintiff's January 16, 1990

payment of the sole proprietor's tax liability a double payment for which he is entitled to a refund.

Second, Plaintiff claims that the money ($206,824.82) which was supposed to be applied by the IRS to the **trust-fund** taxes of Associated (following the 1987 sale of the radio station) was not so applied.

Accordingly, Plaintiff contends that the $206,824.82 should be subjected to an,accounting.

1) Payment to the sole proprietorship

The Plaintiff's first contention is that the money applied by the IRS to the nontrust-fund taxes of Associated (following the 1987 sale of the radio station), as well as any overpayments which arose at that time, should have been applied to the sole proprietorship instead of Associated. Defendant contends that the Plaintiff should not be allowed to relitigate this issue due to the doctrine of collateral estoppel.

The doctrine of collateral estoppel serves the dual purpose of protecting litigants from the burden of relitigating identical issues against the same party, or that party's privy, and of promoting judicial economy by preventing needless litigation. Parklane Hosiery Co. v.Shore, 439 U.S. 322, 326 (1978). Collateral estoppel prevents relitigation of an issue when:

> (1)The issue at stake (is] identical to the one involved in the prior litigation;
> (2) The issue (was) actually litigated in the prior suit;
> (3) The determination of the issue in the prior litigation [was] a critical and necessary part of the judgment in that action; and
> (4) The party against whom the earlier decision is asserted... had a full and fair opportunity to litigate the issue in the earlier proceeding.

McWhorter v. Dixie Nat'l-Life Ins, Co., 887 F.2d 1564, 1566 (11th Cir. 1989).

With respect to Plaintiff's first contention, the first, second, and third collateral estoppel elements are easily met. This issue is identical to the issue actually litigated by the Bankruptcy Court. In fact, the Plaintiff relies on his reading of the Bankruptcy Court's Memorandum opinion of this issue to support his position.(6) Furthermore, the propriety of allocating the funds to Associated, rather than the sole proprietor, was a critical and necessary part of the Bankruptcy Court's judgment. Not only was this issue necessary, it was the very issue upon which the bankruptcy proceeding was based.

The fourth element of collateral estoppel requires that the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. Haywood Jackson Mizell, Plaintiff, owned 100% of the outstanding stock of Shelley Broadcasting Co.,Inc. Plaintiff also owned a controlling interest, 51% of the stock, in Associated Builders Co. Plaintiff was, accordingly, responsible for the actions of Shelley and Associated. Plaintiff was also, of course, responsible for his own actions as an individual and as a sole proprietor. In other words, the Plaintiff had a controlling or exclusive interest in every party involved in the bankruptcy proceeding except the Internal Revenue Service.

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(6)Plaintiff contends that the Bankruptcy Court ordered the $206,824.82 to be applied first to the sole proprietorship (Pls.' Answer to Counterclaim p.2). Unfortunately, Plaintiff misreads that court's opinion. The Bankruptcy Court clearly found that the money was to be applied to Shelley and Associated.

The position taken by Shelley during

the bankruptcy proceeding was identical to the position taken by Plaintiff in the present case. The Bankruptcy Court even described Shelley's actions during the proceeding as "Shelley (through Mizell)" and "Mizell (and Shelley through him)" (Memorandum Opinion p.3, 5). Despite the Plaintiff's attempt to read it differently, the Bankruptcy Court irrefutably held that the money was to be applied to Shelley and Associated and not to the Plaintiff or the sole proprietor.

Plaintiff was afforded a full and fair opportunity to litigate this issue in the bankruptcy proceeding, and the issue was resolved adversely to the Plaintiff's current position. Plaintiff is, therefore, barred from relitigating this issue.

2)Application of the trust-fund taxes of Associated.

The second issue presented by the Plaintiff is whether the money ($206,824.82) which was supposed to be applied by the IRS to the **trust-fund** taxes of Associated (following the 1987 sale of the radio station) was so applied.

This Court must now consider whether this issue is barred by the doctrine of collateral estoppel. In determining what, if any, refund was due Shelley, the Bankruptcy Court specifically considered what amount was due for Associated's trust-fund taxes. The Bankruptcy Court further considered whether such amounts were paid. That court found that trust-fund taxes of $206,824.82 were owed by Associated, and found that Associated's payment of $206,824.82 **was applied** to the trust-fund account by the IRS and that the IRS promptly released all liens of record after the payment (Memorandum Opinion p.2); therefore, this Court is of the opinion that the elements of collateral estoppel are met. First, these issues resolved by the Bankruptcy Court were identical to the issues raised here by

Plaintiff. Plaintiff contends that the $206,824.82 payment was applied to something other than trust-fund taxes. The Bankruptcy Court not only found that the payment was properly applied, but also that the liens on the property were then released.

The second element of collateral estoppel is met because the issue was actually litigated in the Bankruptcy Court.

The third element has been met because, in order for the Bankruptcy Court to render a determination, it was critical and necessary to determine Associated's former liability and whether it had been met.

Finally, as discussed earlier, the Plaintiff had a controlling or exclusive interest in every party involved in the bankruptcy proceeding except the Internal Revenue Service. Furthermore, the Plaintiff's interests in this litigation are identical to Plaintiff's interests during the bankruptcy proceeding. Due to the Plaintiff's control over the previous litigation, this Court is of the opinion that the Plaintiff was afforded a full and fair opportunity to litigate this issue in the bankruptcy proceeding, and the issue was resolved adversely to the Plaintiffs current position.

CONCLUSION

The Plaintiff, Haywood Jackson Mizell, was accorded a full and fair opportunity to litigate the issues raised in this case; therefore, the Plaintiff's claims are barred by the doctrine of collateral estoppel. Because this Court has determined that collateral estoppel prevents the relitigation of these issues, it is unnecessary to address whether the Plaintiff had standing to assert them. Defendant's motion for summary judgment is due to be GRANTED as to the complaint. A separate order will be entered in accordance with this opinion.

As to the Defendant's counterclaim, this Court has not received a summary judgment motion. This Opinion is, therefore, limited to the Plaintiff's claims, and the Defendant's counterclaim stands to be set for trial.

DONE this 10th day of January, 1995

"s/W. Harold Albritton
W. HAROLD ALBRITTON
UNITED STATES DISTRICT JUDGE

FILED JAN 10, 1996

FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

HAYWOOD JACKSON MIZELL,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION
	)	NO. 94-A-1183-S
	)	
	)	
UNITED STATES OF AMERICA	)	
	)	
Defendant	)	

ORDER

On this day the court granted the Defendant's Motion for Summary Judgment and entered summary judgment in favor of the United States of America on the Plaintiff's complaint. This leaves the case pending on the counterclaim of the United States of America against Haywood Jackson Mizell seeking to recover alleged unpaid taxes, together with interest and penalties.

This case is on the court's docket for a term of court commencing February 12, 1996.

In view of the current state of the court's docket, however, this case will not be reached for trial during that term, and the trial is CONTINUED. A new trial date will be set by later order.

The Counter-claimant is given until February 12, 1996, to file a motion for summary judgment on its counterclaim, if it feels that such a motion would be appropriate. In the event such a motion is filed, the court will enter an order giving the Plaintiff/Counter-defendant an opportunity to reply and setting a date for submission of the motion for determination.

If no such motion is filed, the court will enter an order setting a new trial date.

DONE this 10TH day of January, 1996.

S/W. HAROLD ALBRITTON
W. HAROLD ALBRITTON
UNITED STATES DISTRICT JUDGE

APPENDIX C
IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.

HAYWOOD JACKSON MIZELL,

Plaintiff-Counter-Defendant, Appellant.

versus

UNITED STATES OF AMERICA,

Defendant-Counter-Claimant, Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, ___F.2d___)

Before: TJOFLAT and Cox, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion(s) of rehearing En Banc are DENIED.

ENTERED FOR THE COURT

"S/ TJOFLAT
UNITED STATES CIRCUIT JUDGE
FILED SEP 25, 1997

APPENDIX D

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

SHELLEY BROADCASTING COMPANY, INC.,

Debtor

Case No. 89-2855-APG
Chapter 11

SHELLEY BROADCASTING COMPANY, INC.

Plaintiff

v.

INTERNAL REVENUE SERVICE,
Defendant

Adv.Pro.No. 89-0167-APG

MEMORANDUM OPINION

This is a tax refund case under 11 U.S.C. Code 505. Shelley Broadcasting Company Inc. (debtor) filed a complaint seeking a refund of taxes and interest from Internal Revenue Service in the Amount of $104,100.75. Internal Revenue Service disputes the claim.

Trial was held June 27, 1990, following which the parties were allowed to file briefs. The case was submitted on August 7, 1990.(1)

Prior to filing the petition in this case, Shelley sold Radio Station WRJM-FM. At the time of the sale, 15 recorded IRS tax liens were extant against Shelley, the debtor corporation, Associated Builders Corporation, Inc., another corporation, and an individual, Haywood Jack Mizell. Mizell

(1)These findings of fact and conclusion of law thereon are made pursuant to Bankruptcy Rule 7052. This is a core proceeding under 11 U.S.C. code 157(b)(2)(0).

owned 51% of the stock of Associated Builders and all of the Shelley corporation stock.

When the sale was closed, the closing attorney withheld $421,118.29 from the sale proceeds for taxes. That sum, paid to IRS, was sufficient to cover the entire tax liability of Shelley and Associated Builders.(2) Upon receipt of this payment, IRS promptly released all liens of record against these two corporations and Mizell.

Shelley contends that under its sales agreement with the purchaser it was required to pay only the Shelley corporate taxes and the taxes of Mizell, including his individual taxes and the trust fund taxes(3) of Associated Builders for which Mizell was liable because he controlled the operations of that corporation -- not the nontrust fund taxes of Associated Builders.(4)

---

(2)IRS received two checks from the closing attorney. One for $184,873.69 was applied to the Shelley tax account. The other for $245,501.74 was applied to the Associated Builders account and paid employment (trust fund) taxes of $206,824.82 and unemployment (nontrust fund) taxes of $38,676.92. These payments also released Mizell from trust fund tax liability. See note 3. However, none of the funds were applied to Mizell's individual tax liability of some $22,000.

(3)Trust fund or employment taxes, consisting of social security taxes and withholding taxes, are to be withheld from employees' wages and held in trust pursuant to Internal Revenue Code 6672. The two corporations were also liable for federal and state unemployment or nontrust fund taxes.

(4)Four months prior to the sale, Shelley had entered into a sales agreement with the purchaser. The agreement required Shelley to pay, as a condition to closing the sale, "all federal, state, and local taxes due and owing by it which might reasonably result in a lien or charge on the Station's assets being sold." Neither Associated Builders nor IRS was a party to the agreement.

Shelley also contends that is had an unwritten agreement with IRS to release all tax liens of record upon receipt of sufficient funds to pay the taxes said to require payment by the sales agreement.

Shelley bases its claim to a refund on this alleged agreement. Implicit in the agreement is the release of nontrust fund tax liens against Associated Builders without the payment of taxes to release these liens. Mizell (and Shelley through him) wanted all the liens released but did not want to pay the nontrust fund taxes of Associated Builders. This IRS did not agree to do.(5)

Ultimately, Mizell and Shelley, through their attorney, paid Associated Builders taxes of $245,501.74. This was the figure furnished them by IRS. They knew at the time that it included nontrust fund taxes.(6) However, they did not protest

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(5)Mizell requested Forehand, and IRS revenue officer, to furnish the amount necessary to pay only the trust fund portion of Associated Builders taxes. Forehand had dealt with Mizell for several months in an attempt to collect taxes owed by Mizell and the two corporations. He was familiar the pending sale, including the time and place the closing was to take place. He either could not or chose not to comply with the request. Instead, he furnished the amount required to pay all the taxes of Associated Builders. Mizell complained to him about this more than once over a period of several weeks. However, before their dealings had ended, it was time to close the sale. In the interest of not delaying the sale, Mizell abandoned efforts to obtain the amount of these taxes from Forehand.

(6)IRS, through its revenue officer Forehand, gave Mizell an estimate of the amount required to release the liens ($421,118.29). Prior to the sale, Mizell forwarded to IRS two checks totaling this amount, then immediately stopped payment on the checks. He testified that he did so because he discovered the figure included Associated Builders nontrust fund taxes which he did not agree to pay.

payment or request IRS to make any specific applications of these funds. IRS applied $38,676.92 to payment of the nontrust fund taxes of Associated Builders.

The attorney representing Shelley during the sale negotiations and closing (not Shelley's present counsel)(7) was of the opinion, he testified, that the sales agreement required release of all the liens against all three entities for the sale to go through.(8) He therefore requested an amount from IRS to satisfy all liens. Shelley did an about-face with respect to Associated Builders nontrust fund taxes and chose to pay the amount furnished by IRS.(9) The logical conclusion is that

(7)The same attorney represented both Shelley and Mizell. The purchaser had a separate attorney.

(8)As closing attorney for the sale, it was his responsibility to certify to the purchaser that the property being sold would be free of tax liens that might affect it. He was of the opinion that all tax liens of record, including the nontrust fund liens against Associated Builders, had to be paid and satisfied of record to satisfy this responsibility.

From the recorded liens, Associated Builders appeared to be a separate entity. Its nontrust fund tax liens therefore did not appear to affect the property being sold. However, the attorney was of the opinion that the control of Mizell over both this corporation and Shelley might be cause to question the existence of these corporations as separate entities. He testified that nonpayment of the nontrust fund taxes of Associated builders taxes would be a "barrier" to closing the sale. As he testified, he required all liens to be released to avoid an "inchoate or some kind of invisible or imposed liability I didn't know about coming through the [Associated builders] liens that are attributed to Mr. Mizell personally because of the hundred percent penalty." By letter, he requested IRS to furnish the amount required to pay "all the liens."

(9)Mizell's argument that he had to depend on IRS to furnish the correct amount of the taxes he wanted to pay is not persuasive. These amount

Mizell and Shelley (through Mizell) did not want to jeopardize the sale even at the expense of paying all taxes owed by Associated Builders.(10)

The court concludes that no implied contract existed between IRS and Shelley and that Shelley, acting through Mizell and its sale closing attorney, voluntarily paid all taxes owed by Associated Builders. Absent duress, taxes owed by another cannot be recovered by a mere volunteer who paid them. See Collins v. United States, 532 F.2d 1344 (Ct. cl. 1976).

The evidence in this case is not sufficient to establish duress. Shelley was under no constraint, through IRS levy or otherwise, to pay taxes in the amount furnished by IRS or to sell the radio station, and the option not to do either. There were no coercive acts by the IRS revenue officer. Although Mizell stated that the revenue officer "mislead" him, Shelley's attorney, who dealt with the revenue officer for

could have been determined from the recorded tax liens (the nontrust fund liens are clearly identifiable) or from the tax records and copies of the tax returns of Shelley, Mizell, and Associated Builders. Also, he had the services of his attorney and the Certified Public Accountant that he used for "special projects."

(10)The sale was for almost three million dollars. Shelley owned another radio station and other property. Also, it would receive a $350,000 promissory installment note as part of the sales price. This property would be free of tax liens. Although Mizell lost it some two years later through mortgage foreclosure, Associated builders was at the time of the sale a viable corporation, owning some 69 motor vehicles and an inventory. This property would likewise be tax lien free.

The conclusion if inescapable that Mizell, the principal stockholder who orchestrated the entire transaction and acted for both corporations throughout, did not want to see the sale upset by the tax liens. In one of his

several weeks prior to the sale, did not agree that the revenue officer did anything false or misleading.

IRS admits an overpayment of the unemployment taxes of Shelley and Associated Builders in the amount of $16,690.63, but has offset these taxes against other unpaid prepetition taxes which exceed $16,690.63.(11) Therefore, Shelley is not entitled to a refund of any taxes.(12)

An appropriate judgment will enter.

Done this 5 day of September, 1990.

"s/ A. Pope Gordon
United States Bankruptcy Judge

---

several conversations with the IRS revenue officer, he emphasized that "this closing is absolutely essential to me."

(11)The overpayment arose when IRS overestimated the Shelley and Associated Builders unemployment taxes because of the then unknown (to IRS) amount of credit the taxpayers were due for unemployment taxes paid to the State of Alabama. Following the sale Shelley accumulated some $98,100 in unpaid taxes and Associated Builders $81,300, plus interest and penalties. IRS has the right under 11 U.S. C. Code 553 to offset these unpaid taxes against any refund that might be due at this time.

(12)Because of the decision reached, it will be unnecessary to consider the other issues presented: (1)whether the tax refund requested by Shelley was timely and properly filed; (2)whether Shelley has standing to recover taxes paid for Associated Builders; and (3)whether the remaining Associated Builders nontrust fund taxes are offset by other prepetition taxes.

c: Collier Espy, Attorney for Plaintiff
Calvin Pryor, Attorney for Defendant